No. 10266

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

La Verne Co-operative Citrus Association, a corporation; Glendora Co-operative Citrus Association, a corporation; Vernon Orange and Lemon Association, a corporation; Whittier Mutual Orange & Lemon Association, a corporation; Irvine Mutual Association, a corporation, and Citrus Mesa Mutual Lemon Association, a corporation, organized and existing under the laws of California,

Appellants,

vs.

United States of America,

Appellee.

APPELLANTS' OPENING BRIEF.

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No. 10266.

IN THE

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La Verne Co-Operative Citrus Association, a corporation; Glendora Co-Operative Citrus Association, a corporation; Ventura Orange and Lemon Association, a corporation; Whittier Mutual Orange &. Lemon Association, a corporation; Index Mutual Association, a corporation, and Chula Vista Mutual Lemon Association, a corporation, organized and existing under the laws of California,

Appellants,

vs.

United States of America,

Appellee.

APPELLANTS' OPENING BRIEF.

Introductory Statement.

Pursuant to the order of this Court [R. 325] the five causes involved in these appeals have been consolidated for hearing and decision herein on one record. They were consolidated and tried together in the lower court. They all involve substantially the same questions of fact and points of law. Hence, this one brief is written and presented to cover all of the five appeals.

The pleadings, findings and conclusions of law and the final judgments are substantially the same in form and substance. The record, which is based primarily upon an "Agreed Statement of the Case," under Rule 76 of the Rules of Civil Procedure, sets out in full the pleadings, orders, findings of fact, conclusions of law and the final judgment in the case entitled "UNITED STATES OF AMERICA, Plaintiff, vs. LA VERNE CO-OPERATIVE CITRUS ASSOCIATION, a corporation *et al.*, Defendants," in the District Court [R. 6 to 82]. This case will hereinafter be referred to and called "The La Verne Case." The corresponding pleadings, orders and other papers in the remaining four cases are set forth by reference to the files in the La Verne Case, except in the particulars in which they differ therefrom, in which case the difference is noted.

At the trial, on the suggestion of the Court [R. 131], the file in the La Verne Case was referred to and used as a typical example of all the cases on trial, and the same policy will be pursued in this brief, thus avoiding unnecessary repetition.

Each case is concerned with and has as its controlling legislation the Act of Congress of May 12, 1933 (48 Stat. 31—U. S. C. A., Title 7, Section 601 *et seq.*), known as the Agricultural Adjustment Act, as amended August 24, 1934 (49 Stat. 672), and as re-enacted and amended by the Agricultural Marketing Agreement Act of 1937, approved June 3, 1937 (Public No. 137, 75th Congress) [R. 8]. Said Agricultural Adjustment Act, as so re-enacted and amended, will be hereinafter referred to and designated as "The Act."

While no question is raised as to the validity or constitutionality of the Act itself, yet the construction and effect of the Act as to the extent and limitations of the jurisdic-

ion and powers of the Secretary of Agriculture and his subordinates thereunder are directly involved in these appeals and, in particular, the validity and constitutionality of that certain Order of the Secretary of Agriculture known and designated as Order No. 53, "Order Regulating the Handling of Lemons Grown in the States of Arizona and California," effective April 10, 1941, issued by said Secretary under the Act, both on its face and in the application and administration thereof, are directly challenged by the several appellants herein, and are involved in these appeals. The printed Government pamphlet containing Order No. 53 is physically attached to and incorporated in the record herein, pursuant to the order of this Court [R. 327].

Statement of the Pleadings and Facts Disclosing the Basis of Jurisdiction.

Jurisdiction of the District Court.

Each of the five actions involved in these consolidated appeals was instituted by the United States of America, as plaintiff, against the respective defendant or defendants therein, each of whom was a handler and shipper of lemons in interstate commerce from and out of the Southern District of California. The purpose of each of said actions was to obtain a permanent injunction restraining defendants from handling lemons in violation of the terms of Order No. 53 [Comp. Par. V, R. 8, and prayer thereof R. 21].

Each of the appealing defendants answered, denying certain material allegations of the complaint and setting up a separate and special defense. After a trial, the Court made and entered its final judgments, denominated "Decree for Permanent Injunction," in which the respective de-

fendants were restrained and enjoined from handling or shipping lemons in violation of the terms of the Order [R. 80-92-95-98-101].

The plaintiff, United States of America, invoked the jurisdiction of the District Court under and by virtue of the provisions of Section 8a (6) of the Act. The statute referred to expressly vests in the District Courts of the United States jurisdiction to enforce and to prevent and restrain any person from violating any order of the Secretary of Agriculture issued pursuant to the provisions of the Act.

Jurisdiction of This Court.

The jurisdiction of this Court is disclosed by the pleadings and the final judgments rendered by said District Court [R. 80-92-95-98-101], and the several Notices of Appeal from said final judgments [R. 298-299-300-301-302]. Jurisdiction is invoked under Section 128 of the Judicial Code, as amended (U. S. C. A., Title 28, Section 225 (a) First).

Statement of the Case.

A. Summary of the Pleadings.

Allegations I to VI, both inclusive, of the Complaint aver the corporate capacity of the defendants, and other matters of inducement and are admitted by the Answer.

The Complaint avers that, pursuant to the provisions of the Act, the Secretary of Agriculture made and issued Order No. 53 (hereinafter referred to as "the Order") after a public hearing, of which due and legal notice had been given, and at which all interested persons, including defendants, were afforded an opportunity to be heard; that the Secretary found, from evidence introduced at said

hearing, that the issuance of the Order would tend to improve marketing conditions in lemons and to effectuate the policy of the Act; that the Order was issued April 5, 1941, and became effective April 10, 1941 [Pars. VII and VIII, R. 9-10]; that the Order regulates the handling of lemons in the same manner as a Marketing Agreement executed by the Secretary April 5, 1941, after a public hearing, which Agreement was signed by handlers who handled more than 80% of the lemons covered by the Order; that the Secretary determined that the Order was approved by producers who, during a representative period (established by the Secretary), produced at least two-thirds of the lemons produced for market during such period in California and Arizona [Par. IX, R. 10]; that, subsequent to the effective date of the Order, and pursuant to Section 953.2 of the same, the Secretary established a Lemon Administrative Committee which at all times thereafter functioned as provided in the Order [Par. X, R. 11]; that each of the defendants is a handler of lemons, as defined in the Order, and prior to May 31, 1941, filed with the Committee an application for a prorate base and for allotments [Par. XI, R. 12]; that the Secretary on or about May 31, 1942, pursuant to Section 953.4 of the Order, on recommendation of the Committee and other information, fixed and determined proration bases for all handlers of lemons who applied for a prorate, including defendants, and established a weekly regulation period for handling and shipping lemons commencing June 1 and ending June 8, 1941 [Par. XII, R. 12]; that the Secretary, under the Order, fixed the total quantity of lemons which could be shipped from California and Arizona in interstate and foreign commerce during said period at 650 carloads [Par. XIII, R. 12]; and fixed a certain allotment for each of the

defendants for said period at a certain definite number of packed boxes of lemons, which was the largest amount which said respective defendants could lawfully ship in such commerce during said period [Pars. XIV and XVII, R. 13-14]; that each of the defendants during said period handled and shipped in such commerce a quantity of lemons in excess of the amount authorized to be shipped by such respective defendants in violation of the Act and Order [Pars. XV and XVI, R. 13-14; XVIII and XIX, R. 15].

That portion of the Answer directed to paragraphs VII to XIX, both inclusive, of the Complaint, makes certain admissions and certain denials of said allegations. The issues raised by said denials need not be considered on these appeals by reason of the fact that the Stipulations of Fact entered into, both in writing and orally at the trial, are sufficient to sustain the Findings of Fact made by the Court (to the extent to which such Findings go) on the issues raised by said denials.

Paragraph XXIII of the Complaint [R. 17] avers active competition in the lemon market, the absence of regulations therein and the adverse effect thereof on interstate and foreign commerce, with consequent lowering of prices to handlers and growers.

The Answer, paragraph XXIII [R. 30-32], admits the allegations of said paragraph XXIII of the Complaint in so far as they describe the adverse conditions of the lemon market, but expressly avers that such conditions have not been caused or aggravated by the absence of regulations of marketing, but have been caused and aggravated by the operation of Order No. 53, which Order and the operation thereof have resulted in unstabilized and disorderly marketing conditions.

The Court made no finding on or concerning the issues raised by the pleadings concerning this paragraph XXIII. It, evidently, considered the same as immaterial and surplusage in view of the theory it took of the entire case [R. 139].

Paragraph XXIV [R. 18-20] avers that each of the defendants conducts its business in competition with other handlers of lemons complying with the Order; that the effect of defendants' violation of the Order has impaired the effectiveness of the program inaugurated by the Order in said commerce in lemons, to disrupt and obstruct such commerce, to render partially ineffective the lawful regulation of such commerce, as provided in the Act and Order, and to bring about unstabilized market conditions which have injured the lemon industry, and which Congress has sought to prevent, and to defeat the policy of Congress as declared in the Act.

It is further alleged that each of the defendants has failed and refused, and is failing and refusing to comply with the Order, and has indicated that it will violate the provisions thereof in the future; and that the continued non-compliance by defendants with the Order is and will be injurious to such commerce in lemons, and to growers, handlers and consumers thereof, and threatens the stability of such commerce; that unless each of defendants is immediately restrained from further violation of the Order, other handlers of lemons subject to it and future Orders of the Secretary will be encouraged to violate the provisions thereof, all of which will tend to thwart the National policy of improving marketing conditions; that violations of the Order by defendants cause, and will continue to cause, great and irreparable damage to the plaintiff and to the public, and plaintiff is without adequate remedy at law.

Concerning paragraph XXIV of the Complaint, the *Answer* admits that defendants conduct their business in competition with other handlers of lemons, and that each of the defendants at times prior to the service of the restraining Order have failed and refused to comply with the terms of the Order fixing the weekly allotments and limiting their shipments in said commerce, and admits that the plan of regulation contained in the Order contemplates the proration and allotment of lemons from week to week under conditions specified in the Order. All of the other allegations in said paragraph are denied [Ans. Par. XXIV, R. 32].

The Court made a Finding [Find. XIII, R. 73] adverse to defendants on certain of the material issues thus raised by said paragraph XXIII and the Answer thereto, which said Finding is challenged by appellants as being unsupported by the evidence [see Specification of Errors No. 9, *infra* p. 22].

B. Special Affirmative Defense.

Each of the Answers contained a special affirmative defense [R. 33], in which it pleaded in detail the facts concerning the growing, picking, handling, storing, shipping and marketing of lemons by the lemon industry in California in general, and by each of said defendants in particular, both before and since the promulgation of said Order No. 53, and the effect of the Order and the administration and application thereof on the business and property of each of the respective defendants and the growers affiliated therewith, and averred and claimed that Order No. 53 and the orders of the Secretary implementing it, both on their face and as applied and administered by the Secretary and his Agents, were and are unreasonable,

arbitrary, unjust and discriminatory as against the respective defendants, and constitute an unwarranted and unlawful exercise of the police powers and are violative of the Fifth Amendment to the Constitution of the United States, in that they deprive each respective defendant of its property without due process of law [Ans. La Verne, Pars. XII and XIII of Spec. Defense, R. 49-51].

The Court refused to consider this defense, denied defendants the right to establish the same and excluded all offers of proof made by defendants for that purpose [see Proceedings at Trial, *infra* p. 10]. This is assigned as error herein [Specifications of Errors Nos, 1-2-3, *infra* p. 21].

C. Stipulations of Fact.

Two written Stipulations of Fact were entered into by the parties [R. 118-129], and thereafter received in evidence on behalf of defendants [R. 241]. The facts stipulated to were almost entirely concerned with certain allegations of the special defense in defendant's answer. None of the facts so stipulated to were considered by the lower court to be of any materiality or consequence in the decision of said cause, except the Stipulation [R. 124] as to the total quantity of lemons which might lawfully be handled in interstate commerce for said weekly regulation period commencing June 1, 1941, and the number of packed boxes which might lawfully be handled and shipped by the defendant under its allotment during that period. One of the findings of the Court is in accordance with this particular stipulation. The remaining facts stipulated to in said stipulations are in no wise considered in the Findings.

D. The Pre-Trial Conference.

A pre-trial conference was held on December 18, 1941. Certain rulings of consequence were made at this conference, but no independent record of said rulings was made or kept [R. 116]. However, said rulings were referred to and again made and adhered to at the trial, as will hereafter appear.

E. Proceedings at the Trial.

At the commencement of the trial [R. 131] Counsel for defendant reminded the Court of its

> "ruling on the pre-trial hearing that the actual taking of evidence would not be permitted"

and accordingly that he had prepared his offers of proof. To this, the Court responded [R. 132]:

> "The Court: Yes. At our pre-trial conference I ruled that the defendants be held to follow their administrative remedy and that in these actions the court would not receive evidence on the sufficiency of the evidence before the Secretary of Agriculture. As I understand, Judge Crump, under your theory it would be virtually a trial *de novo* of the questions that were before the Secretary of Agriculture."

Counsel responded [R. 132] that he was not contending for a trial *de novo* of the questions before the Secretary, but that defendants were attacking the constitutionality of the Order, both as written, and as it necessarily operates, on the ground that it deprives them of their property without due process of law, and that it is discriminatory and confiscatory; and that the evidence which defendants proposed to offer would go to substantiate such contentions.

The Court adhered to the ruling that it would refuse to consider or receive any evidence to sustain the special defenses in the answers. Thus, the Court said [R. 153]:

> "The Court: It seems to me that inasmuch as the court at the pre-trial conference, of which there is no record at this time, as far as the files are concerned, held that the defendants would have to pursue their administrative remedy and that the court was not going to receive evidence as set forth in the special defenses here, that an offer of proof should be sufficient without the necessity of calling the witnesses to the stand. However, the court is very much interested in these offers of proof, and if the court should, during the proceeding, determine that it desires to hear certain evidence, then I will so indicate to counsel, and such witnesses may be placed on the stand."

At no time did the Court indicate that it would receive any such evidence, but at all times adhered to its ruling that defendants were confined to their administrative remedy, review of the Secretary's ruling under Sec. 608(c)(15)(A) and (B) of Title 7 U. S. C. A. Such adherence is evidenced by certain language of the Court in its opinion at the close of the case reading as follows [R. 252]:

> "It further appears to me that the Act provides for an exclusive remedy of review, which excludes all other judicial intervention."

The admissions in the Answer and certain stipulations at the trial were sufficient to establish the following facts:

1. That Order No. 53 was in fact made and issued by the Secretary.

2. That in pursuance of the provisions of the Order a Lemon Administrative Committee was appointed and acted as such.

3. That, in pursuance of the Order and on the recommendation of the Committee the Secretary fixed certain allotments prescribing the quantity of lemons that might be shipped by each of said respective defendants during the weekly regulation periods set forth in the complaint.

4. That, during one or more of such regulation periods, each of the defendants shipped in interstate or foreign commerce, a quantity of lemons in excess of the quantity so allowed to it for such period; and that

5. At the commencement of the instant proceeding there was pending before the Secretary a petition on behalf of defendants for a review under Section 608(c)(15)(A), Title 7 U. S. C. A. praying for a modification or exemption from Order No. 53, which petition was dismissed by the Secretary and there is now pending in the District Court of the United States for the Southern District of California, Central Division, an action by defendants pursuant to Section 608(c)(15)(B), Title 7 U. S. C. A.

The plaintiff, United States of America offered in evidence a transcript of the proceedings before the Secretary of Agriculture on the hearing upon which Order No. 53 was based. The Court, of its own motion, denied the offer and excluded the evidence [R. 152].

This closed the case for the plaintiff.

F. Defendants' Case.

It was stipulated that all evidence offered or received should apply to each and all of the consolidated cases on trial [R. 142].

Defendant's Counsel then made certain offers of proof. He preceded these offers by the statement that the evidence was offered [R. 180]:

> "* * * to prove that by reason of the allegations of the respective answers, in the affirmative portions of the answers, that Order No. 53, and the Orders of the Secretary supplementing said Order, all and each thereof is unjust, unreasonable, arbitrary and discriminatory as to the respective defendants, and this said Order and the Orders of the Secretary supplementing said Order, each and all constitute an unwarranted and unlawful exercise of the police powers, and are violative of the Fifth Amendment of the Constitution of the United States in that they deprive the respective defendants of their property without due process of law."

It was stipulated and accepted by the Court that Counsel's statements as to what he proposed to prove might stand for all offers and witnesses and need not be repeated [R. 181].

Defendant's Counsel then called some seven witnesses and after certain preliminary questions of identification, etc., stated in detail the facts which he offered and proposed to prove by each respective witness. Such facts are set forth in full in the transcript and cover 85 pages thereof [R. 156-241]. In addition, there were offered 11 written exhibits, consisting of summaries, schedules, etc., referred to in the offered testimony. These exhibits are set forth in

full in the transcript and cover 37 pages thereof [R. 256-293].

The Court adhered to its pre-trial ruling and refused to admit or consider any of the offered evidence [R. 243].

In its opinion, the Court said [R. 248-249]:

> "The defendants claim that said Order is arbitrary, unreasonable, unjust, and discriminatory, and violative of their constitutional rights. The defendants have offered evidence in support of said affirmative defenses, and the sole question now before the Court is a determination of the admissibility of this evidence.
>
> "I am of the opinion that such evidence is not admissible."

The ruling of the Court refusing to admit the offered evidence is assigned as error herein (Spec. of Error Nos. 2 and 3, *infra* p. 21).

G. The Findings of Fact.

The material findings [R. 64] are to the effect that the Secretary, after a public hearing, of which notice to all interested parties, including defendants, had been given, issued Order No. 53, effective April 10, 1941, and continuously thereafter [Finds. IV-V, R. 66]; that subsequent to said effective date, the Secretary established a Lemon Administrative Committee which has at all times since exercised the powers and performed the duties prescribed by the Act [Find. VII, R. 70]; that each of the defendants is a handler of lemons as that term is defined in the Order [Find. VIII, R. 71]; that at the commencement of the instant proceedings there was pending before said Secretary, on behalf of defendants, a petition for

review under certain provisions of the Act, viz., Section 608(c)(15)(A) of Title 7 U. S. C. A., praying for a modification of or exemptions from Order No. 53; that said petition has been dismissed by the Secretary and there is now pending in the U. S. District Court, for the Southern District of California, Central Division, an action by the defendants to review the ruling of the Secretary pursuant to certain provisions of said Act, viz., Section 608(c)(15)(B) of Title 7, U. S. C. A. [Find. IX, R. 71]; that the respective defendants filed written applications for prorate bases and allotments with said Committee [Find. X, R. 71]; that the Secretary fixed a prorate base, established a weekly regulation period and fixed the quantity of lemons which could be shipped during said regulation period by each of the defendants; that each of the defendants, during said period, shipped in interstate commerce a quantity of lemons in excess of the quantity fixed by the allotment of the Secretary [Find. XI, R. 71-72]; that each of the defendants has refused to comply with the terms of the Order [Find. XII, R. 73].

Concerning Finding X [R. 71] as to the filing by the defendants with the Committee of written applications for a prorate base and for allotments, this finding is based solely upon a written Stipulation of Facts to that effect, but the stipulation expressly provides that all applications and other papers filed with the Committee were filed *under protest*, and with express reservation of any rights of said defendants [R. 128]. Except to this extent, appellants do not attack any of the aforesaid Findings I to XII, inclusive, as not being supported by the evidence or stipulations.

Finding No. XIII [R. 73].

This finding is to the effect that the non-compliance of defendants with the provisions of Order No. 53 will be injurious to interstate and foreign commerce and to growers, handlers and consumers of lemons, and threatens the stability of such commerce, which will incite other handlers of lemons to violate said Order and other subsequent Orders of the Secretary. Such violations will tend to thwart the National Policy of improving the marketing conditions concerning the handling of lemons in interstate and foreign commerce.

This finding is attacked as having no evidence to support it [Stat. of Points No. 6, R. 297; Spec. of Error No. 9, *infra* p. 22].

H. The Conclusions of Law.

The material conclusions of law of the lower Court [R. 73] are to the following effect:

That in so far as the present action is concerned, the following CONCLUSIVE PRESUMPTIONS apply and are binding and controlling on the Court, to-wit:

1. That the notice given by the Secretary with respect to the hearing on the proposed Order regulating the handling of lemons was duly and regularly made and is valid;

2. That the hearing was held in accordance with said notice and General Regulations, Series A No. 1 of the Agricultural Adjustment Administration of the Department of Agriculture, and all interested persons, including defendants, were afforded full opportunity to be heard concerning said proposed Order;

3. "* * * that the Secretary found from the evidence introduced at said hearing and the record thereof,—" [R. 741].

The conclusion here quotes verbatim the findings of the Secretary contained in and a part of Order No. 53 [Exhibit "A" of complaint, attached to transcript in pamphlet form] to the effect that the terms and provisions of Order No. 53 tend to effectuate the declared policy of the Act; the portion of the Order quoted being the seven findings commencing with Finding "(1)" on page 2 of said pamphlet and ending with Finding "(4)" on page 3 thereof;

> (NOTE: It will be noted that the Court does not, itself, attempt to find any facts, but merely concludes that it is conclusively presumed that the Secretary did so find.)

4. That the establishment of the Lemon Administrative Committee and the selection of its members is in accordance with law and is valid, and that said Committee has exercised only the powers and performed the duties given and required by law [R. 77]; this conclusion is assigned as error [Spec. of Error No. 4, *infra* p. 21];

5. That the prorate bases issued to each of the defendants were regularly made and are valid [R. 78]. This conclusion is assigned as error [Spec. of Error No. 5, *infra* p. 21];

6. That the allotments issued to each of the defendants were regularly made and are valid [R. 78]; this conclusion is assigned as error [Spec. of Error No. 6, *infra* p. 22].

The Court further concluded as a matter of law that the shipments by each defendant of lemons grown in California in excess of their respective allotments was in violation of law [R. 78]. This conclusion is assigned as error

[Spec. of Error No. 7, *infra* p. 22]. The final conclusion [R. 78] is that plaintiff is entitled to a permanent injunction restraining defendants, and each of them, their officers, agents, etc., from handling lemons in violation of said Order No. 53, and to a judgment for costs. This conclusion is assigned as error [Spec. of Error No. 8, *infra* p. 22].

(NOTE: It will be noted that there is no finding of fact, nor is there any conclusion of law, directed to any of the allegations of fact contained in the special affirmative defenses of the answer, or to any of the issues raised by such special defense.)

I. THE JUDGMENTS.

Final judgments, entitled "DECREE FOR PERMANENT INJUNCTION" were made and entered in each of the five cases. In these judgments the respective defendants, their officers, agents, employees, etc., are restrained and enjoined from handling or shipping lemons grown in California or Arizona in interstate or foreign commerce with Canada, in violation of or contrary to the terms and provisions of said Order No. 53 until further order of this Court, or until such time as an order or judgment may be entered by said U. S. District Court in the action brought by the defendants for a review of the Secretary's denial of their petition filed pursuant to sub-section (15) of Section 608(c), Title 7, U. S. C. A., which shall determine that said Order No. 53 is invalid or inapplicable to the plaintiff's in said action [R. 80-92-95-98-101]. Judgment is also given plaintiff for costs.

Statement of Questions Involved.

The questions involved are:

1. In a proceeding under Sec. 8(a)(6) of the Act (U. S. C. A. Title 7, Sec. 608(a)(6)) in which the United States of America, as Plaintiff, is seeking a permanent injunction restraining defendant (a handler of lemons) from violating the provisions of an Order of the Secretary of Agriculture, regulating the handling and shipping of lemons, issued pursuant to said Act, has such defendant the right to plead and urge, as a defense to such action, that said Order, as to him, both on its face and in its necessary administration and application, is unreasonable, unjust, discriminatory and confiscatory to such extent as to deprive him of his property without due process of law in violation of the Fifth Amendment to the Constitution of the United States?

2. Under such circumstances is it true that the only remedy available to such handler in or by which he may urge such defense is by a proceeding for a modification of or exemption from such order and a review of the Secretary's ruling thereon by the District Court of the United States, all under the provisions of Sec. 608(c)(15)(A) and Sec. 608(c)(15)(B) of Title 7 U. S. C. A.?

3. Did the Court err in holding that Order No. 53 and the actions and conduct of the Secretary of Agriculture and his agents in the application and administration of said Order were, in these injunction proceedings, conclusively presumed to be constitutional and valid, and that the defndants had no right to question the constitutionality or validity of said Order or said actions or conduct?

4. Did the Court err in precluding and preventing the defendants from introducing evidence to prove or establish

the facts alleged in their respective answers, and especially in the special defenses therein set forth?

5. Did the Court err in holding and concluding, as a matter of law, that the following conclusive presumptions applied and were controlling in these injunction proceedings:

A. That said Lemon Administrative Committee has, at all times, legally exercised only the powers and performed the duties given and required by law;

B. That the prorate bases issued to each of the defendants were regularly made and were valid;

C. That the allotments issued to each of the defendants had been regularly made and were valid;

D. That the shipment by each of said defendants of lemons grown in California for interstate and foreign commerce, in excess of their respective allotments were in violation of law;

E. In holding and concluding that the plaintiff is entitled to a permanent injunction restraining defendants, and each of them, their officers, agents, employees, etc., from handling lemons in violation of the Order.

6. Is there substantial evidence to support the finding that the non-compliance by defendants with Order No. 53

A. Was or would be injurious to interstate or foreign commerce; or

B. Was or would be injurious to growers, handlers or consumers of lemons; or

C. Did or would threaten the stability of interstate or foreign commerce in lemons; or

D. Did or would tend to thwart the National Policy of improving the marketing conditions in the handling of lemons in interstate or foreign commerce.

Specification of Errors.

The Court erred:

1. In holding that Order No. 53 and the actions and conduct of the Secretary of Agriculture, and his agents (in particular, the Lemon Administrative Committee) in the application and administration of the Order were, in these injunction proceedings, conclusively presumed to be constitutional and valid, and that these appealing defendants, and each of them, had no right to question the constitutionality or validity of the Order, or said actions or conduct.

2. In precluding and preventing these appealing defendants, and each of them, from introducing evidence to prove or establish the facts alleged in their respective answers, and especially in the special defenses therein set forth.

3. In precluding and preventing these appealing defendants, and each of them, from introducing the testimony and evidence specifically detailed in the several offers of proof made by these appealing defendants at the trial.

4. In holding and concluding as matter of law [Con. No. VI, R. 77] that, as to this particular proceeding, it is conclusively presumed that the Lemon Administrative Committee has, at all times, legally exercised only the powers and performed the duties given and required by law.

5. In holding and concluding as matter of law [Con. No. VII, R. 77] that the prorate bases issued to each of the defendants, in so far as this particular action is concerned,

are conclusively presumed to have been regularly made and are valid.

6. In holding and concluding as matter of law [Con. No. VIII, R. 78] that the allotments issued to each of the defendants, in so far as this particular form of action is concerned, are conclusively presumed to have been regularly made and are valid.

7. In holding and concluding as matter of law [Con. No. IX, R. 78] that the shipment by each of said defendants of lemons grown in the State of California for interstate commerce, in excess of their respective said allotments, was in violation of law.

8. In holding and concluding as matter of law [Con. No. X, R. 78] that the United States of America is entitled to a permanent injunction restraining the defendants, and each of them, their officers, agents, employees, etc., from handling lemons in violation of the terms and provisions of Order No. 53.

9. The evidence is insufficient to sustain Finding of Fact No. XIII [R. 73], in this, that there was no evidence to prove that the non-compliance by defendants with Order No. 53

A. Was or would be injurious to interstate or foreign commerce; or

B. Was or would be injurious to growers, handlers or consumers of lemons; or

C. Did or would threaten the stability of interstate or foreign commerce in lemons; or

D. Did or would tend to thwart the National Policy of improving the marketing conditions in the handling of lemons in interstate or foreign commerce.

ARGUMENT.

I.

The District Court Erred in Holding Order No. 53 Must Be Conclusively Presumed to Be Constitutional and Valid and That Defendants Have No Right to Question Its Constitutionality. Also in Precluding and Preventing Defendants From Introducing Evidence to Prove the Facts Alleged in Their Respective Answers and Especially in the Separate Defenses Therein Set Forth.[1]

The basis for the judgments of the District Court is found in the following from its opinion:

> "It is a cardinal principal of administrative law, that the administrative remedy must be followed and judicial relief will not be granted before the prescribed administrative remedy has been exhausted.
>
> * * * * * * * * *
>
> If I am correct in my viewpoint the legality of the order can only be questioned in a district court under the provisions of said Section 608c (15)."

In reaching its conclusion that the defendants could not raise constitutional questions in the injunction cases before it, the District Court relied upon the cases of

Federal Power Commission v. Metropolitan Edison Co., 304 U. S. 375, 82 L. Ed. 1408;

Myers v. Bethlehem Shipbuilding Corporation, 303 U. S. 41, 82 L. Ed. 683;

Rochester Telephone Corporation v. United States, 107 U. S. 125, 83 L. Ed. 1147;

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[1]Specifications of Error 1 to 8 inclusive.

United States v. Superior Court, 19 Cal. (2d) 189;

Railroad Commission v. Rowan & Nichols Oil Co., 310 U. S. 573, 84 L. Ed. 1368, and 311 U. S. 570, 85 L. Ed. 358;

none of which cases support the conclusion. In so far as they are pertinent here, they are to the contrary.

In *Federal Power Commission v. Metropolitan Edison Co., supra,* the Supreme Court said that upon an application by the Federal Power Commission for the enforcement of its order "respondents would have full opportunity to contest its validity." (304 U. S. p. 386, 82 L. Ed. p. 1415.) In other words, on an application by the commission to the court to enforce its order, the validity of the order is a proper subject for inquiry.

Myers v. Bethlehem Shipbuilding Corporation, supra, reached the Supreme Court on certiorari to the Circuit Court of Appeals for the First Circuit to review decrees affirming decrees of the United States District Court of the District of Massachusetts enjoining, at the suit of an employer and of employees of such employer, the holding of a hearing by the National Labor Relations Board. This case might be in point if the defendants in these cases had sought by injunction proceedings to restrain the Secretary of Agriculture from holding a hearing, but it has no application in a case brought by the United States to enforce the order of the Secretary, where the order is attacked on constitutional grounds.

Rochester Telephone Corporation v. United States, supra, was an appeal from a decree of the District Court of the United States for the Western District of New York dismissing on the merits a bill to review an order

of the Federal Communications Commission requiring the disclosure of certain information. Since this was a proceeding instituted as a review of an order of the commission, we are unable to see how the case supports the views expressed in the opinion of the learned District Judge.

United States v. Superior Court, supra, was an original proceeding in the Supreme Court of California, whereby the United States sought to prohibit the Superior Court of Los Angeles County from taking action in a suit pending before it which was brought by certain shippers and handlers of oranges to enjoin the enforcement of an order issued by the United States Secretary of Agriculture. It might be in point had the defendants in the instant cases sought an injunction against the enforcement of Order No. 53 before the completion of the review proceedings under Title 7, U. S. C. A., Section 608c (15), and without showing the inadequacy of the administrative remedy, arising from threatened irremedial injury (19 Cal. (2d) at pages 196-197.) It does not, however, support the proposition that where persons are brought into court as defendants that they are not entitled to attack the constitutionality of an order by way of defense.

National Labor Relations Board v. Jones & Laughlin Steel Corporation, supra, originated with a petition of the National Labor Relations Board for the enforcement of its order requiring an employer to cease and desist from discriminating against members of a labor organization with regard to hire, tenure of employment, etc. In the course of its opinion the Supreme Court said:

> "Any person aggrieved by a final order of the Board may obtain a review in the designated courts

with the same procedure as in the case of an application by the Board for the enforcement of its order." (301 U. S. 24, 81 L. Ed. 901.)

In the present cases we have challenged the constitutionality of Order No. 53, and in the *Jones* case (which was instituted by the Labor Board to enforce its order) the respondents challenged the constitutionality of the Act there in question. The Supreme Court found no fault with this procedure. On the contrary, the opinion says that if respondent's contention were correct, "the Act would necessarily fall by reason of the limitations upon the federal power which inheres in the constitutional grant, as well as because of the explicit reservations of the Tenth Amendment." (301 U. S. 29, 30, 81 L. Ed. 907.)

It will be noted that although the National Labor Relations Act of 1935 provides for a review of the final order of the board, Jones & Laughlin Steel Corporation did not seek a review. The constitutional questions were raised in that case by an affirmative defense to petitions of the National Labor Relations Board seeking the enforcement of its orders. In the pending cases the constitutional questions were raised in the same manner, that is to say, by affirmative defenses to the complaints filed at the instance of the Department of Agriculture to enforce its order.

The learned Judge of the District Court cites the two cases of *Railroad Commission of Texas v. Rowan & Nichols Oil Co.* as supporting him in his conclusion that a judgment denying the government injunctive relief would have the effect of annulling Order No. 53 and his

conclusion that the defendants could with impunity ignore their administrative remedy if permitted to introduce evidence in the pending cases. Also that to grant them relief in these cases would, in effect, grant to them judicial relief prior to the exhaustion of their administrative remedies, and would in effect permit the court in these cases to try the cases presented to the Secretary of Agriculture on the review proceedings and substitute the opinion of the Judge of the District Court for that of the Secretary of Agriculture, which, he says, would be in direct conflict with the legislative intent. [R. p. 253.]

We do not so construe the decisions which the Judge of the District Court relies on. The *Rowan* cases were brought by the company to enjoin the Railroad Commission of the State of Texas from carrying into effect a proration program for oil, whereas, the instant cases were instituted by the government under the provisions of Title 7, Section 608a (6), which provides:

> "The several district courts of the United States are hereby vested with jurisdiction specifically to enforce, and to prevent and restrain any person from violating any order, regulation, or agreement, heretofore or hereafter made or issued pursuant to this chapter, in any proceeding now pending or hereafter brought in said courts."

In the *Rowan & Nichols* cases it appeared that the Railroad Commission of Texas had issued its proration order covering the East Texas oil field, where respondents' wells were located; that thereupon the Rowan & Nichols Oil Company sought and obtained a decree from the United States District Court enjoining the commission from carrying its proration plan into effect, which

decree, with irrelevant modifications, was affirmed by the Circuit Court of Appeals. The gist of the opinion of the Supreme Court is that courts should not substitute their own conception of the fairness and reasonableness of a challenged order of a state commission for that of such commission, where there is a conflict in the evidence or, rather, where there is evidence to support the ruling of the commission. The point does not seem to have been made that the oil company had not exhausted its administrative remedy before bringing its suit in the United States District Court.

In his opinion in the instant cases the District Judge quotes from Title 7, Section 608a (6) U. S. C. A., as follows:

> "The several district courts of the United States are hereby vested with jurisdiction specifically to enforce, and to prevent and restrain any person from violating any order, regulation, or agreement, heretofore, or hereafter made, or issued pursuant to this chapter, in any proceeding now pending or hereafter brought in said Courts."

"I believe," he said, "it was the intention of Congress under said provision to limit the jurisdiction of the District Court to enforce and prevent violations of any order, regulation, or agreement made or issued pursuant to the Agricultural Adjustment Act. I believe the use of the word 'specifically' is of special significance and limits this court's jurisdiction to the precise things therein designated. I think said section is a limitation upon rather than a grant of power."

It is apparent to us that the word "specifically" and the construction of the Act which follows in the opinion of the District Court is entirely wrong.

If the District Court were correct, then the Act would deprive defendants of their property without due process of law. It is clear to us that the words "specifically to enforce" have their customary and well-recognized meaning in law, *i. e.*, specific performance. What the Congress intended was to provide a means of enforcing a valid order by the District Courts, not to limit their jurisdiction. The procedure is analogous to that provided with respect to the orders of other administrative agencies, such as the National Labor Relations Board (vide Title 29, Sec. 160(e), U. S. C. A.), just as the review proceedings authorized by Title 7, Sec. 608c (15) (A) and (B) with respect to orders of the Secretary of Agriculture are generally similar to the review proceedings provided in Title 29, Sec. 160 (f), U. S. C. A. with respect to orders of the National Labor Relations Board.

There is, however, this prime difference between the two acts with respect to reviews: Section 160 (g) of the National Labor Relations Act provides:

> "The commencement of proceedings under said Section (e) or (f) shall not, *unless specifically ordered by the court,* operate as a stay of the Board's order." (Emphasis added.)

There is no similar provision in the Agricultural Marketing Act.

It has repeatedly been held that where either the provisions of a statute or the decisions of the court interpreting a statute preclude a supersedeas or stay until the

legislative process is completed by the final action of the reviewing court, due process is not afforded.

Porter v. Investors Syndicate, 286 U. S. 461, 470-471, 76 L. Ed. 1226, 1232, 53 S. Ct. 132;

Pacific Telephone & Telegraph Co. v. Kuykendall, 265 U. S. 196, 201, 68 L. Ed. 975, 979, 44 S. Ct. 553;

Oklahoma Natural Gas Co. v. Russell, 261 U. S. 290, 67 L. Ed. 659, 43 S. Ct. 353;

United States v. Illinois Central R. Co., 291 U. S. 457, 461, 78 L. Ed. 909, 916.

A quotation from *Porter v. Investors Syndicate, supra,* is given in the Appendix, beginning on page 1.

If the trial Judge is correct in his ruling, then a person may be ordered by the courts, at the behest of the administrative agency, to obey any order which such agency may see fit to make, no matter how patently invalid it is, and be utterly helpless to obtain redress pending final exhaustion of the administrative process for review, a process which may and sometimes does take years to complete.

Take the instant cases. Order No. 53 became effective on April 10, 1941 [R. p. 10]. When these cases were commenced there was pending on behalf of defendants a petition for review under Title 7, Sec. 608c (15) (A) U. S. C. A., praying for a modification of or exemption from Order No. 53, and there is still pending and not yet tried a proceeding in the United States District Court for the Southern District of California, for reveiw, pursuant to Title 7, Sec. 608c (15) (B) U. S. C. A. [R. p. 71]. Had not the war intervened, with its resulting

tremendously increased prices for lemon concentrates and other by-products, defendants and their grower members might well have been utterly ruined before effective action could be had through the pursuit of their administrative remedies.

We cannot believe that the Congress intended to limit the powers of the federal courts by the provisions of the Act quoted in the opinion of the District Court. If it did, then its action is violative of the Fifth Amendment.

Section 608c (14) of Title 7, U. S. C. A., provides:

> "Any handler subject to an order issued under this section, or any officer, director, agent, or employee of such handler, who violates any provision of such order (other than a provision calling for payment of a pro rata share of expenses) shall, on conviction, be fined not less than $50 or more than $500 for each such violation, and each day during which such violation continues shall be deemed a separate violation: *Provided,* That if the court finds that a petition pursuant to subsection (15) of this section was filed and prosecuted by the defendant in good faith and not for delay, no penalty shall be imposed under this subsection for such violations as occurred between the date upon which the defendant's petition was filed with the Secretary, and the date upon which notice of the Secretary's ruling thereon was given to the defendant in accordance with regulations prescribed pursuant to subsection (15)."

Now, let us assume that after notice of the Secretary's ruling denying defendant's petition under section 608c(15)(A) was given and while a review was pending in the District Court under subsection (15)(B), the Government had instituted criminal proceedings seeking $500 fines accu-

mulating daily, as provided in subsection (14), and let us assume that the order of the Secretary instituting a program for the marketing of lemons showed on its face that it was unquestionably outside of the purpose and scope of the act. Yet, if the District Court is correct, defendants could have been convicted and subjected to penalties without being permitted to introduce evidence for the purpose of proving the act to be unconstitutional. They could not even have introduced the transcript of the proceedings before the Secretary.

In *Baltimore & Ohio R. Co. v. United States,* 298 U. S. 349, 80 L. Ed. 1209, plaintiffs appealed from a decree of the District Court of the United States for the Eastern District of Virginia, dismissing a suit to set aside an order of the Interstate Commerce Commission relating to the division among participating carriers of rates on Florida citrus fruit. While the Supreme Court affirmed the decree of the District Court on the merits, it held that inasmuch as the appellants were not given and could not obtain a hearing before the Commission upon the question of confiscation (298 U. S. 371, 80 L. Ed. 1225), they properly invoked judicial power to obtain constitutional protection against the Commission's order, saying:

> "The District Court rightly held them entitled to introduce evidence in addition to that contained in the record before the Commission and rightly proceeded upon consideration of all the evidence to make findings and, upon the basis of the facts that it found, to decide upon the constitutional question."

Conceding that

> "even where the statute sought to be applied and enforced by an administrative agency is challenged upon

> constitutional grounds, completion of the administrative remedy has been held to be a prerequisite to equitable relief." (*United States v. Superior Court,* 19 Cal. (2d) at p. 195),

yet

> "The inadequacy of the administrative remedy, arising from threatened irremedial injury, is a recognized ground for immediate injunctive relief, and, upon proof of that fact, the exhaustion requirement has frequently been held inapplicable." (19 Cal. (2d) at p. 196.)

Surely if persons affected by an unconstitutional administrative order may obtain injunctive relief in a suit brought for that purpose, where their administrative remedies are inadequate, there is much greater reason for permitting them to defend against the enforcement of an order on the ground that it is unconstitutional where they are brought into court unwillingly as defendants at the instance of an administrative agency which seeks the aid of the court to specifically enforce such order.

We have not found any decision in any jurisdiction which goes to the extent of denying the right of a defendant, in a suit brought to specifically enforce an order of an administrative agency, or restrain the violation thereof (which amounts to the same thing), to introduce evidence in support of his defense, where he challenges the validity of the order on constitutional grounds. In every case which we have examined where an administrative agency has sought the aid of the courts in enforcing its order, the defendants have been permitted to produce evidence to the effect that the order was violative of either state or federal constitution.

At the trial, the Assistant United States Attorney stated the Government's contention on this point, and a colloquy ensued between court and counsel, which is pertinent and enlightening.

"Mr. Worthington: May it please the court, in answering Judge Crump's argument, I submit that this court is a statutory court. It is not a constitutional court. Its right to decide constitutional questions are those given to it by Congress. Congress can subsequently limit, in specific instances, the right of this court to try constitutional questions. And I submit, in this particular one Congress has in fact placed a limitation on the district courts, where an action is brought by the Government for violation of (122) this particular statute, from going into that constitutional question. And the remedy in these cases is to proceed before the Secretary of Agriculture, and on denial they can go to the district court for review.

The Court: I don't see where you and Judge Crump are apart at all.

Mr. Crump: Well, we are apart on this proposition: That this court has no right to go into constitutional questions. I don't say that for a minute. I think that inherent and embraced in the act itself is a valid order, in order that injunction may issue. But I was talking about procedure. Assuming that the court adhered to the procedure as outlined on the—

The Court: Do I understand, Mr. Worthington, that this court has the right to go into the question as to whether the order of the Secretary is a proper order, unless it complies with an act of Congress?

Mr. Worthington: Using the term 'this court' advisedly. That is, this court is sitting simply to hear

and determine proceedings brought by the Government to restrain violation of the order; yes, sir.

The Court: I would like to have your authorities on that. As I understand, if there is an act of Congress in dispute, the court still can pass upon it, but the appeal is directly to the Supreme Court. In questions of constitutionality in the state law they call in two extra judges. But you mean to say that I must accept any order that the Secretary of Agriculture puts out, and say that notwithstanding if it is made in a conflict with the statute which provides for it on the face of it, I still have to accept it?

Mr. Worthington: We first—

The Court: I am asking that question.

Mr. Worthington: Yes, sir, your Honor, when the case before you is nothing else than a petition of the Government for a re- (123) straining order and a violation of that order.

The Court: Where is your authority?

Mr. Worthington: *There is no authority for it.* (Emphasis added.)

The Court: Then, on what do you base that?

Mr. Worthington: On the authority that this court is a statutory court; that the court has no right to try constitutional questions, except that Congress has given it that right. But it comes now with a special right in a particular instance. It has provided a separate tribunal, and that is before the Secretary of Agriculture, where the parties think they have been injured by the action of the Secretary, pursuant to an act of Congress, can proceed and their entire rights may be heard and determined before the Secretary of Agriculture. And if the Secretary of Agriculture goes against them they have a right

to go into the district court and have all questions of law determined by the district court. The action that we are proceeding under is separate and distinct entirely. It simply provides protection to the Government. Otherwise, to grant Judge Crump's contention would be that the defendants could go ahead and violate the statute without paying any attention to it whatever, and when the Government attempted to stop them they would come in and plead the Government's action against them contrary to what the statute has provided. They wouldn't have to proceed at all. Congress has provided a definite method of procedure for them.

The Court: Well, you proceed with your case. What evidence have you to offer? Have you got any evidence to support it?

Mr. Worthington: Not as far as counsel's statement is concerned, but I would like to offer a transcript before the Secretary of Agriculture—

Mr. Crump: Will you pardon me a moment?

Mr. Worthington: Yes.

Mr. Crump: Just one word with respect to this argument of Mr. Worthington: Here again we are faced with this difficulty of (124) having adverse ruling, and according to Mr. Worthington the constitutional questions must be presented to the Secretary of Agriculture, which means that the Secretary, according to the Government's argument, is vested with the authority to determine whether his own acts are constitutional. That goes way beyond what the Secretary of Agriculture says himself, because in the hearing before the Secretary of Agriculture he ruled that all constitutional questions (were) was for the court and not for the Secretary. Now, if the Secretary ruled that the court must do it, and the

Government says that the Secretary must do it, and neither one of them does it, then we can't have any ruling on constitutional questions at all.

Mr. Worthington: I don't think the court got from my statement that the Secretary would pass on the constitutional questions.

The Court: Who would pass on it?

Mr. Worthington: The United States District Court would pass on it in the review proceedings. I am not for one moment suggesting that the Secretary of Agriculture rule on constitutional questions." [R. pp. 148-151.]

We can see no valid basis for the position of the Government relative to the ruling of the District Court. Why should defendants be *required* to introduce their evidence concerning constitutional questions in a hearing before the Secretary of Agriculture, when the Secretary will not and cannot pass on such questions? Why should the Government be permitted specifically to enforce an invalid order, which, being invalid, is no order at all? And, for purposes of this appeal, we submit that this court should assume that the District Court might properly have held, after hearing the testimony and examining the documentary evidence (including that introduced before the Secretary of Agriculture) that the order was invalid. At least the defendants are entitled to have the trial court consider and pass on the evidence and to a decision on the merits.

"The supremacy of law demands that there shall be opportunity to have some court decide whether an erroneous ruling of law was applied; and whether the proceeding in which facts were adjudicated was

> conducted regularly. To that extent, the person asserting a right, whatever its source, should be entitled to an independent judgment of a court on the ultimate question of constitutionality."
>
> *St. Joseph Stock Yards Co. v. United States,* 298 U. S. 38, 84; 80 L. Ed. 1053, 1058.

We submit that the "some court" for such decision is the United States District Court, and that the instant cases afford the proper opportunity.

No good purpose would be served by attempting an argument on the merits in these cases at this time, and we shall make none. But we direct attention to the fact that considerable evidence relating to the constitutional questions was introduced in the hearings before the Secretary, which was supplemented by additional evidence offered and refused admission by the District Court in these cases.

The Congress cannot require or authorize the United States District Court to execute or enforce *any* order that the Secretary of Agriculture or other administrative agency may assume to make. (*Kentucky & I. Bridge Co. v. Louisville & N. R. Co.,* 37 Fed. 567, 613-614.)

(For quotation from the opinion see Appendix.)

II.

The Evidence Is Insufficient to Sustain Finding of Fact Number XIII [R. 73] in This, That There Was No Evidence to Prove That the Non-Compliance by Defendants With Order No. 53:

A. Was or Would be Injurious to Interstate or Foreign Commerce; or

B. Was or Would be Injurious to Growers, Handlers or Consumers of Lemons; or

C. Did or Would Threaten the Stability of Interstate or Foreign Commerce in Lemons; or

D. Did or Would Tend to Thwart the National Policy of Improving the Marketing Conditions in the Handling of Lemons in Interstate or Foreign Commerce.[2]

The only evidence received consisted of two stipulations of fact. Neither of these stipulations supports Finding XIII in the *LaVerne* case and similar findings in the other cases.

It follows that the finding is not supported by any evidence, unless we accept Conclusion Number VI [R. p. 77] as being equivalent to evidence.

In that Conclusion the court held, as a matter of law, that in these proceedings it is conclusively presumed that the Lemon Administrative Committee has at all times legally exercised the powers and performed the duties given and required by law.

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[2]Specification of Error 6.

III.

The Court Erred in Holding and Concluding as a Matter of Law [Conclusion Number VI, R. 77] That as to These Proceedings It Is Conclusively Presumed the Administrative Committee Has at All Times Legally Exercised Only the Powers and Performed the Duties Given and Required by Law.[3]

In addition to what we have said on this subject under Heading I of the argument, we would add that while there is a presumption that an order of an administrative agency is valid and within the jurisdiction of the agency, *such presumption is not conclusive.* Authorities might be multiplied, but it is sufficient in this connection to quote the language of Chief Justice Hughes, delivering the opinion of the court in *St. Joseph Stock Yards Co. v. United States,* 298 U. S. 38, 51-52, 80 L. Ed. p. 1041, which we do in the Appendix.

Conclusion.

For the reasons stated, the decrees of the United States District Court should be reversed and the cases remanded with instructions to proceed with the trial of the cases on their merits, with the right to defendants to introduce evidence in support of their constitutional defenses.

Respectfully submitted,

GUY RICHARDS CRUMP,
Attorney for Appellants.

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[3]Specification of Error 4.

APPENDIX.

Porter v. Investors Syndicate, 286 U. S. 461, at pp. 470-471; 76 L. Ed. 1226, at p. 1232:

> "Where an ancillary to the review and correction of administrative action, the state statute provides that the complaining party may have a stay until final decision, there is no deprivation of due process, although the statute in words attributes final and binding character to the initial decision of a board or commissioner. Pacific Live Stock Co v. Lewis, 241 U. S. 440, 454, 60 L. ed. 1084, 1098, 36 S. Ct. 637. But where either the plain provisions of the statute (Pacific Teleph. & Teleg. Co. v. Kuykendall, 265 U. S. 196, 203, 204, 68 L. ed. 975, 980, 981, 44 S. Ct. 553) or the decisions of the state court interpreting the act (Oklahoma Natural Gas Co. v. Russell, 261 U. S. 290, 67 L. ed. 659, 43 S. Ct. 353) precludes a supersedeas or stay until the legislative process is completed by the final action of the reviewing court, due process is not afforded, and in cases where the other requisites of federal jurisdiction exist recourse to a federal court of equity is justified."

Kentucky & I. Bridge Co. v. Louisville & N. R. Co., 37 Fed. Reptr. 567:

This was a proceeding to enforce an order of the Interstate Commerce Commission. Defendant attacked the order as invalid upon various grounds and in addition contended, as stated at page 587:

> "Respondent submits that Congress cannot require or authorize this court to execute or enforce any order that said commission may assume to make; * * *".

In determining that the power granted was not a non-judicial power, the court stated, pp. 613-614:

> "The commission is charged with the duty of investigating and reporting upon complaints, and the facts found or reported by it are only given the force and weight of *prima facie* evidence in all such judicial proceedings as may thereafter be required or had for the enforcement of its recommendations or order. The functions of the commission are those of referees or special commissioners, appointed to make preliminary investigation of and report upon matters for subsequent judicial examination and determination. In respect to interstate commerce matters covered by the law, the commission may be regarded as the general referee of each and every circuit court of the United States, upon which the jurisdiction is conferred of enforcing the rights, duties and obligations recognized and imposed by the act. It is neither a federal court under the constitution, nor does it exercise judicial powers, nor do its conclusions possess the efficacy of judicial proceedings. This federal commission has assigned to it the duties, and performs for the United States, in respect to that interstate commerce committed by the constitution to the exclusive care and jurisdiction of congress, the same functions which state commissioners exercise in respect to local or purely internal commerce, over which the states appointing them have exclusive control. Their validity in their respective spheres of operation stands upon the same footing. The validity of state commissioners invested with powers as ample and large as those conferred upon the federal commissioners, has not been successfully questioned when limited to that local or internal commerce over which the states have exclu-

sive jurisdiction; and no valid reason is season for doubting or questioning the authority of congress, under its sovereign and exclusive power to regulate commerce among the several states, to create like commissions for the purpose of supervising, investigating and reporting upon matters or complaints connected with or growing out of interstate commerce. What one sovereign may do in respect to matters within its exclusive control, the other may certainly do in respect to matters over which it has exclusive authority.

We are also clearly of the opinion, that this court is not made by the act the mere executioner of the commissioner's order or recommendation, so as to impose upon the court a non-judicial power. Congress has, in some cases, assigned to federal courts duties which, though of a *quasi* judicial nature, did not come within the judicial power granted in the constitution. Thus the act of March 23, 1792 (1 U. S. St. at Large, 243), required the circuit judges to examine into the claims of persons asking for pensions, and make report thereon to the secretary of war. The judges of the circuit courts for the districts of New York and Pennsylvania held that the function or duty thus imposed was not judicial. So the circuit court for the district of North Carolina declared that it could not execute that part of the act which required it to examine and report an opinion on the unfortunate cases of officers and soldiers disabled in the service of the United States. *Hayburn's* case, 2 Dall 409. In U. S. v. Ferreira, 13 How. 40, which arose under the act of March 3, 1849, directing the judge of the district court of Northern Florida to adjudicate upon certain claims for injuries, and report the evidence thereon, the

supreme court held that the authority thus conferred was not 'authority to exercise any of the judicial powers of the United States under the constitution.' And the judge's decision was held not to be the judgment of a court of justice, but simply 'the award of a commissioner.' The principle announced in these cases would sustain counsel's position, if this court, under the provisions of the interstate commerce law, is limited and restricted to the mere ministerial duty of enforcing an order or requirement of the commission, whether it be regarded as a judicial or a non-judicial tribunal. But such is not, in fact, the jurisdiction which this court is called upon to exercise. The suit in this court is, under the provisions of the act, an original and independent proceeding, in which the commission's report is made *prima facie* evidence of the matters or facts therein stated. It is clear that this court is not confined to a mere re-examination of the case as heard and reported by the commission, but hears and determines the cause *de novo* upon proper pleadings and proof, the latter including non only the *prima facie* facts reported by the commission, but all such other and further testimony as either party may introduce, bearing upon the matters in controversy."

St. Joseph Stock Yards Co. v. United States, 298 U. S. 38, at pp. 51-52; 80 L. Ed. 1033, at p. 1041:

"Legislative declaration or finding is necessarily subject to independent judicial review upon the facts and the law by courts of competent jurisdiction to the end that the Constitution as the supreme law of the land may be maintained. Nor can the legislature escape the constitutional limitation by authorizing its agent to make findings that the agent has

kept within that limitation. Legislative agencies, with varying qualifications, work in a field peculiarly exposed to political demands. Some may be expert and impartial, others subservient. It is not difficult for them to observe the requirements of law in giving a hearing and receiving evidence. But to say that their findings of fact may be made conclusive where constitutional rights of liberty and property are involved, although the evidence clearly establishes that the findings are wrong and constitutional rights have been invaded, is to place those rights at the mercy of administrative officials and seriously to impair the security inherent in our judicial safeguards. That prospect, with our multiplication of administrative agencies, is not one to be lightly regarded. It is said that we can retain judicial authority to examine the weight of evidence when the question concerns the right of personal liberty. But if this be so, it is not because we are privileged to perform our judicial duty in that case and for reasons of convenience to disregard it in others. The principle applies when rights either of person or of property are protected by constitutional restrictions."